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No. 80-1765

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner

v.

HYDROLEVEL CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN SOCIETY FOR TESTING AND MATERIALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT TO THE FILING OF THIS BRIEF

Counsel for petitioner and counsel for respondent have each consented to the filing of this brief amicus curiae by the American Society for Testing and Materials ("ASTM" or "the Society"). Copies of their letters are filed with this brief.

INTEREST OF THE AMICUS CURIAE

ASTM is a scientific and educational Society. It was incorporated in 1902 for the stated purpose of "the development of standards on characteristics and performance of materials, products, systems and services, and the promotion of related knowledge."

ASTM is the major developer and publisher of standards in the United States. Its activities are limited

to the development of standards (and methods of test to determine compliance with standards) and the promotion of related knowledge. It does not certify products; it does not test products; it does not involve itself in any way in the marketing of any product, material, system or service for which a standard has been developed under its auspices. Its standards are widely used solely because of the universal respect for the technical and scientific validity of its work.

The standards development work of the Society is carried on by approximately 84,000 participants who, voluntarily and without compensation, serve on the thousands of committees, sub-committees, task groups and other units

within the Society. These persons are representatives of industrial companies, government agencies, academic institutions, libraries, consulting firms, etc., as well as individual scientists, doctors, architects, engineers and others interested in the Society's work. Approximately 10% of them come from outside the United States.

The Society has provided the framework within which these volunteers do their important work. The Society provides only administrative assistance and procedural rules and regulations designed to insure that due process is afforded all participants in its work and a true consensus

of their views is achieved.*

The opinion and judgment of the United States Court of Appeals for the Second Circuit in this action may impose upon ASTM liability under the anti-trust laws for the acts of any of the many thousands of participants in its work, even though those acts are not authorized or endorsed by the Society and are, in fact, beyond the Society's power to prevent or control. The Society has an interest in seeking to prevent this unfortunate (and, we believe, unwarranted) new development in the law.

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*ASTM is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code, and exempt from state and local taxation under Pennsylvania law. Application of ASTM, 231 F.Supp. 686 (E.D.Pa. 1964); ASTM v. Board of Revision of Taxes, 423 Pa. 530, 225 A.2d 557 (1967).

QUESTION PRESENTED

May a non-profit, membership organization be held liable under the anti-trust laws for acts of participants in its work which purport to be taken on behalf of the organization, but which are not authorized or endorsed by the organization and are beyond the organization's power to control?

SUMMARY OF ARGUMENT

It is unreasonable, and contrary to the public interest, to impose liability under the anti-trust laws upon a voluntary membership organization for acts of participants in its work which the organization has not authorized or endorsed and which it cannot control.

ARGUMENT

As we have pointed out above, there are some 84,000 participants in the work of ASTM's thousands of technical committees, sub-committees, task groups and other units. The standards and methods of test published by the Society are the product of the work of these persons.

Each of these units has a chairman and other officers. Virtually all participants are (and must be to do their work) equipped with ASTM stationery and other paraphernalia which could be misused without the Society's knowledge.

ASTM has a headquarters in Philadelphia and a staff of approximately 200 persons whose function it is to

provide the administrative services and support to enable the committees, sub-committees and other units of the Society to do their work. There is absolutely no way that headquarters personnel can control each and every written communication (much less every oral communication) emanating from the chairmen, officers or members of the Society's committees, sub-committees and other units. There is no way that the Society can prevent one or more of these individuals from issuing some interpretation of one of the Society's standards or methods of test which he purports to be issuing on the Society's behalf but which is, in fact, unauthorized.

If the Society may be held liable under the anti-trust laws for such a communication, the Society (a non-profit corporation with modest assets) is likely to continue to exist only until the entry of the first substantial anti-trust judgment against it under this new rule of law.

We believe that such a rule of law is unfair, unreasonable and not in the public interest.

ASTM (and other organizations like it) perform an important public function. Rather than attempting to describe the importance of ASTM's work ourselves, we quote below what courts have said on this subject:

"ASTM is the first source to which federal, state and municipal governments turn in seeking specifications, and ASTM specifications [standards] are

more widely used by them than the specifications of any other body. These governments rely extensively upon ASTM since they have neither the time nor the money to write all their own specifications, and their dependence upon ASTM is increasing all the time.

"The writing of specifications by ASTM is an activity in the public interest and conducive to the public welfare, and is important to the future operation of industry and government.

"Membership in ASTM, participation on its committees, the expression by members of their scientific opinions in committee meetings, and voting by members on proposed specifications, are activities in the public interest and conducive to the public welfare."

(Application of the American Society for Testing and Materials, U.S.D.C., E.D.Pa., 231 F.Supp. 686 (1964) Findings of Fact, Nos. 20,21,23)

"Among the objective achievements of the Society's works may be enumerated: Safer buildings, better roads, improved surgical implants, more advanced missiles; New scientific discoveries and developments resulting from advanced research; Better education for science and engineering students; Free library, free lectures and free knowledge for all people; Critical and necessary work for federal, state,

municipal and foreign governments; Savings to federal, municipal and other taxpayers.

"It must be apparent from even this meager summarization of the Society's spheres of activity that it is more than a 'business pool' as urged by the City. Dr. Allen V. Astin, Director of the National Bureau of Standards (an arm of the U.S. Government), speaking of the public benefits derivable from the Society's work said: 'The general public benefits through having an efficient economy. And our present technological way of life, which has raised for all of us our standard of living to unprecedent heights, is based to a significant extent on having available standard methods, reliable methods, of evaluating the characteristics and performance of material. Now, this is the main product, and from this all of us benefit. And, of course, the other participants in this economy, like the producers, and the big technological consumers, also benefit. But from all of these, the public is the major benefactor.'"

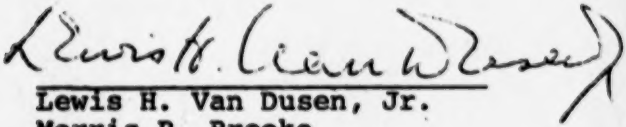
(American Society for Testing and Materials v. Board of Revisions of Taxes, 423 Pa. 530, 534 (1967).)

A rule of law which imposes liability upon ASTM for the acts of participants in its work, which the Society has not authorized and cannot control, would jeopardize the Society and its work for no reason. The person who does these unauthorized acts (and presumably the organization which this person represents) may be held liable under the anti-trust laws for their conduct. There is no public interest to be served by formulating a rule of law which makes an unwitting non-profit corporation (which would disavow the acts if it knew of them) also liable. Such a rule, if allowed to stand, can lead to the destruction of voluntary organizations like ASTM and the termination of their important public work.

CONCLUSION

For the foregoing reasons, the petition of the American Society of Mechanical Engineers for a writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,



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AFFIDAVIT OF FILING AND SERVICE

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF PHILADELPHIA : ss.

Lewis H. Van Dusen, Jr., being duly sworn according to law, deposes and says upon his personal knowledge:

1. I am a member of the Bar of the Supreme Court of the United States and an attorney for the American Society for Testing and Materials ("ASTM") in this case No. 80-1765.

2. On May 22, 1981, I caused to be sent by first class United States mail, postage prepaid, 40 copies of the foregoing Brief Amicus Curiae of ASTM, together with the ancillary papers required by the Rules of this Court, to the Clerk of this Court for filing.

3. On May 22, 1981, I caused to be served by first class United States mail, postage prepaid, 3 copies of said Brief upon Harold R. Tyler, Jr., Esquire, 30 Rockefeller Plaza, New York, NY 10112, counsel for petitioner in No. 80-1765, and upon Carl W. Schwarz, Esquire, One Farragut Square South, Washington, DC 20006, counsel for respondent in No. 80-1765.

Lewis H. Van Dusen, Jr.

Sworn to and subscribed before me this 22nd day of May, 1981.

Notary Public

ROSE A. MULLIGAN
NOTARY PUBLIC
PHILA. COUNTY, PHILA.
My Commission Expires Jan. 19, 1983